ORIGINAL

No. 05-35569

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL WILDLIFE FEDERATION, et al.

Plaintiffs-Appellees,

v.

NATIONAL MARINE FISHERIES SERVICE, and

UNITED STATES ARMY CORPS OF ENGINEERS;

Defendants-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
No. CV-01-00640-RE

TREATY TRIBES' JOINT *AMICUS CURIAE* BRIEF IN OPPOSITION TO FEDERAL DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

The Columbia River Treaty Tribes join with the Plaintiffs-Appellees in urging this Court to deny the "emergency" motion of Federal Defendants-Appellants (the Corps, the Bureau and NOAA Fisheries)[1] seeking a stay of Senior District Court Judge James A. Redden's June 10, 2005 Injunction Order ("Injunction Order") enjoining the Corps to provide spill for Snake River fall Chinook salmon (listed as "threatened" under the Endangered Species Act (ESA)) at federal dams on the Columbia/Snake River and denying the requested flow and drawdown relief. Since the injunction issued, the Corps of Engineers has reached a general agreement with the Treaty Tribes, Plaintiffs, and others on an implementation plan for the court ordered 2004 summer spill. Lorz Dec. Exh. 1 (sumbitted by Appellee NWF).

The District Court issued this relief, "cutting the baby in half" in terms of granting the spill injunction and denying the flow and drawdown relief, (Transcript at 117(Appellee NWF's Exh. 10)), only after it had previously issued a thorough 45 page opinion with 13 pages of attachments on May 26, 2005 holding that NOAA's 2004 Biological Opinion for the Federal Columbia River Power

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[1] Intervenor-Defendants "BPA Customer Group" have sought an emergency stay pending appeal, and this brief responds to their arguments as well.

System (FCRPS or DAMS) was legally flawed in four separate and independent respects, based on the plain language of the Endangered Species Act and its implementing regulations. *NWF v. NMFS*, 01-640-RE, Opinion and Order (D. Or. May 26, 2005) (Docket #986) (Fed Appellants' Att. B).

Senior District Court Judge James A. Redden has been presiding over this complex matter for well over two years. (Docket # 378). The District Court has a technical advisor to assist it in understanding the voluminous and highly technical reports, studies, and opinions regarding the status of the fish and the impact of the FCRPS.[2]

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[2] U.S. District Court Judge Ancer L. Haggerty has upheld the appropriateness of employing a technical advisor in this complex case involving the ESA and the Federal Columbia River Power System, ruling that:

> It is well known that cases brought under the ESA can involve complex technical and scientific matters. Judge Redden has called upon Dr. Horton for the type of advice he has rendered to other judges, including Judges Craig, Marsh, and King. Dr. Horton has been providing technical and scientific services to courts for more than 20 years, and his training, experience, and involvement in cases such as this evidence that he is eminently qualified to serve as the court's technical advisor.
>
> Dr. Horton's role and duties correspond to those contemplated by the Ninth Circuit in *Federal Trade Commission v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1213 (9th Cir. 2004): "The role of a technical advisor is to organize, advise on, and help the court understand relevant scientific evidence. A technical advisor is a tutor who aids the court in understanding the ''jargon and theory'' relevant to the technical aspects of the evidence." In this case, Dr. Horton helps Judge Redden understand the voluminous and highly technical reports, studies, and opinions regarding the status of the fish and the impact of the FCRPS.

The District Court has become intimately familiar with the issues involving the Endangered Species Act, the status of the salmon, and the impact of the FCRPS during the course of this protracted litigation. In May, 2003, the District Court reviewed a very extensive administrative record and held that the 2000 FCRPS BiOp was arbitrary and capricious because it relied on actions that had not undergone section 7 ESA consultation or were not reasonably certain to occur. *NWF v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003). The District Court, at the federal government's request, left the 2000 BiOp in place and remanded it to NOAA to correct its deficiencies. (Docket # 439). The District Court established a Steering Committee and quarterly reporting procedures to update the court and the parties on NOAA's compliance efforts, or lack thereof. (Docket # 444).

During the remand, the federal government's decision to curtail summer spill for salmon required the District Court to enjoin the Corps of Engineers and NOAA from reducing or eliminating summer spill at the FCRPS dams. Docket #602. In a single sentence, the Ninth Circuit denied federal Appellants' request for a stay pending appeal of this decision. *NWF v. NMFS*, No. 04-35673, Order (9th Cir. August 13, 2004).

NWF v. NMFS, 01-640-RE, Opinion and Order (D. Or. March 2, 2005)(Docket #793) (Appellee NWF's Exh. 35) .

Many of the underlying biological issues in the District Court's 2004 proceedings on summer spill are the same as those considered by the District Court in 2005, such as the biological benefits of spilling water at the FCRPS dams, the costs of doing so, and the public interest. Many of the witnesses in 2005 submitted declarations in the previous proceedings in this case.

Prior to issuing the injunction that is the subject of this appeal, the District Court provided a full opportunity for the multitude of parties and *amici* to file voluminous briefs and extensive supporting declarations in support of their positions, including detailed biologic and economic declarations which the District Court considered. Even after the legal briefing on the injunction was complete, the District Court provided the federal government an additional opportunity to file responsive declarations (Docket #991) which the federal government took full advantage of, filing nine declarations (Docket #995, 997-1002, 1004-1005).

The District Court was thoroughly prepared for the hearing on the injunctive relief request, identifying at the outset that it had read the numerous briefs and declarations that had been filed. Transcript at 3, 12 (Appellee NWF Exh. 10). During the course of the four hour hearing, the two attorneys for the federal government were provided multiple opportunities to present their arguments to the

District Court. Transcript at 7-25, 109-117 (Appellee NWF's Exh. 10). As the briefs and the hearing transcript reflect, and as discussed more fully below, despite the fact that the 2004 FCRPS BiOp had been held to be legally flawed, neither the Corps, NOAA, nor BOR came forward with a single additional measure to improve conditions for fall Chinook salmon during their juvenile migration. The briefs, the hearing, and the District Court's prior opinions document that NOAA's own scientists have repeatedly acknowledged that fall Chinook salmon are in a deficit situation, that spill provides the best passage route for salmon, and that transporting fall Chinook salmon (ie. taking them out of a hostile river environment and barging them around dams) neither helps nor harms salmon. The administrative record contained documents from the state and tribal fishery co-managers supporting spill for juvenile fall Chinook salmon. The Plaintiffs' and Treaty Tribes' expert declarations documented this as well. As the District Court's 2005 Injunction order indicates, the District Court held that there was an ongoing violation of the Endangered Species Act and that "the DAMS strongly contribute to the endangerment of the listed species and irreparable injury will result if changes are not made" before granting the spill injunction and denying the flow and drawdown relief. *NWF v. NMFS*, 01-640-RE, Opinion and Order at 8 (D. Or. June 10, 2005) (Federal Appellant's Att. B) ("2005 Injunction Order").

The District Court did not abuse its discretion or act clearly erroneously in enjoining the Corps to provide spill for ESA-listed Snake River fall Chinook salmon. Appellants' motion simply re-argues issues that the District Court thoroughly considered, and the declarations it offers are from another federal agency (the Bonneville Power Administration) that is neither a party nor a fishery manager and resemble those already reviewed by the District Court. The District Court gave consideration to the impact of this injunctive relief on the ratepayers before enjoining the Corps to provide spill.

The Federal Appellants' extraordinary procedural request urges this Court to make a snap judgment in this very complex case that would fly in the face of the careful, thorough and exhaustive review conducted by a District Court that has become intimately familiar with these issues and that has the benefit of a technical advisor to assist it. Last summer in this case, this Court denied the federal Appellants' request for an emergency stay pending appeal of Judge Redden's decision enjoining the Corps to continue to provide spill for salmon. *NWF v. NMFS*, No. 04-35673, Order (9th Cir. August 13, 2004). The Treaty Tribes urge this Court to deny the federal Appellants' request for a stay this year as well.

ARGUMENT

1. The District Court properly concluded that injunctive relief is necessary to mitigate the harm to ESA-listed Snake River fall Chinook salmon from the legally flawed 2004 BiOp for the Action Agencies' operation of the FCRPS based on the federal government's own admissions that fall Chinook salmon are in a deficit situation. The District Court properly concluded that spill would mitigate this harm and provide benefits for ESA-listed Snake River fall Chinook.

Three of the last five years, the amount of "take" imposed by the FCRPS dams on Snake River fall chinook has exceeded the limits permitted by applicable ESA biological opinions. Tribes' Inj. Br. at 11 (Docket #840). The salmon were already in a deficit situation. *NWF v. NMFS*, 01-640-RE, Opinion and Order at 8 (D. Or. July 29, 2004) (Docket #602); *NWF v. NMFS*, 01-640-RE, Opinion and Order at 48-49 (D. Or. May 26, 2005) (Fed Appellants' Att. B) (summarizing historical, current and projected population trends of Snake River fall Chinook). And, in 2005, NOAA's analysis again indicated that the FCRPS dams would again take more than their limit.[3] In and of itself, this situation should compel remedial action. Tribes' Inj. Reply Br. at 11-15 (May 16, 2005) (Docket #917). Yet, the

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[3] The in-river Snake River fall Chinook survival predicted by NMFS' SIMPAS analysis for 2005 is only 3.5%, which is less than the minimum 8% needed to fall within the ITS range. Toole 2nd Dec. Ex 3. Contrary to the caption, the text of paragraphs 21 and 22 in the Toole declaration does not assert that the authorized incidental take is not likely to be exceeded in 2005.

court found that it did not need to act on this basis, since the defendants had failed to comply with the substance and procedures of section 7(a)(2) of the Act. 2005 Injunction Order at 3-4 (Federal Appellants' Att. B). In so ruling, the court was rightfully concerned about the total magnitude of the mortality imposed by the dams and the status of the species. *Id.* at 8. The total mortality imposed by the FRCPS dams has recently exceeded 90% of the juvenile migrating salmon. Olney 2nd Dec. ¶ 20 (Appellee NWF's Exh. 14).

The district court had ample evidence before it in the record on the benefits of spill. Not only did the court hear from the parties during the summer of 2004 about the efficacy of spilling water for migrating juvenile Snake River fall chinook, the court had before it lengthy commentary in the administrative record. According to an independent body of scientists providing technical advice to state, federal, and tribal salmon managers: "the benefits of spill for fish passage are well established and accepted throughout the scientific community. There is substantial data and literature documenting the direct and indirect benefits of spill for fish passage." Olney Dec.¶ 6 (Appellee NWF's Exh. 14). Because spill has proven to be so effective, NMFS prescribed in 2000 that "measures that increase juvenile fish passage over FCRPS spillways are the highest priority" for passage improvements. 2000 BiOp at 9-82 (Appellee NWF Exh. 31); Olney Dec. ¶ 6

(Appellee NWF Exh. 14). The State of Oregon's comments on the draft 2004 BiOp's firmly point out that:

> The benefits of summer spill for increasing survival of Snake River fall Chinook have been thoroughly documented (Oregon 2000; Oregon 2003; ODFW 2004a; JTS 2004a); therefore, the summer spill reference operation should include spill at collector projects (spring levels). This operation will improve survival of Snake River fall Chinook by increasing spillway passage and reducing the proportion of fish transported.

Oregon Comments at 12 (A.R. Doc. C.237; Appellee NWF's Exh. 32). Washington, Idaho, and CRITFC's technical commentary expressed similar views. Washington Comments at 4 (A.R. Doc. C.247); Idaho Comments at 8 (A.R. Doc. C.234; Appellee NWF Exh. 18); CRITFC Comments at A-11 (A.R. Doc. C.231; Appellee NWF Exh. 5). The simple fact is that spill is already provided at four of the eight FCRPS dams to benefit Snake River fall chinook.

Since 1995, each FCRPS BiOp has called for the evaluation of the biological effects of transporting Snake River fall Chinook compared to the best possible in-river migration conditions, that is with spill at the Snake River dams. For the past decade the action agencies have failed to heed this requirement. Tribes' Sum J. Br. at 24-28 (Docket #775); Tribes' Inj. Br. at 20-21 (Docket #840). Even without spill at the Snake River dams, it is clear that transportation is no better than leaving the fish in the river. Heinith Dec. ¶ 28 (Appellee NWF

Exh. 2). With spill, Snake River fall chinook survival will increase. Lorz Dec. ¶ 16. Moreover, the region's scientists will be in a position to monitor the biological effects. Lorz Dec. ¶ 15.

2. The District Court properly analyzed and concluded the 2004 FCRPS BiOp is legally flawed on four separate and independent legal grounds based on the plain language of the ESA and its implementing regulations, making it unlikely the Appellants will prevail on appeal.

The Endangered Species Act (ESA) reflects "[t]he plain intent of Congress to halt the trend towards species extinction, whatever the cost" and "the legislative history undergirding [section] 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species." *TVA v. Hill*, 437 U.S. 153, 184, 185 (1978); *see also NWF v. NMFS,* Opinion and Order at 11-12 (May 26, 2005) (Fed Appellants' Att. B) ("Summary Judgment Opinion"). Pursuant to the ESA's section 7 consultation requirement, federal agencies operating the Federal Columbia River Power System (FCRPS) dams must consult with NOAA Fisheries to insure that impact of these dams do not jeopardize the continued existense of the Snake/Columbia River salmon or destroy or adversely modify their critical habitat. 16 U.S.C. section 1536(a)(2).

As the ESA is designed to afford first priority to saving species, the status of

the species is the starting point for any analysis. The District Court's summary judgment opinion explicitly reviews NOAA's status reviews of the listed Snake/Columbia River salmon runs. Indeed, Attachment I to the District Court's opinion contains a summary of the historical, current, and projected population trends for the listed species, taken from NOAA's 1995, 2000, 2004 BiOps and the Biological Review Team report. The District Court opinion notes that, in addition to others, the Snake River sockeye are "in danger of extinction" and Snake River Fall Chinook, Snake River Spring Summer Chinook, and Snake River Steelhead are "likely to become endangered in the foreseeable future." Summary Judgment Opinion at 8 (Fed Appellants' Att. B).

It is against the backdrop of the ESA and its implementing regulations and the status of the runs, that the District Court found that the 2004 BiOp flawed in four respects: "(1) the improper segregation of the elements of the proposed action NOAA deems to be nondiscretionary; (2) the comparison, rather than aggregation, of the effects of the proposed action; (3) the flawed critical habitat determinations; and (4) the failure to consult adequately on both recovery and survival in the jeopardy determination. " Summary Judgment Opinion at 15 (Fed Appellants' Att. B) (emphasis in original).

For each of these legal flaws, the District Court examined the ESA, its

implementing regulations, and the case law in reaching its conclusion. For example, in finding that NOAA may not segregate nondiscretionary impacts of the action for purposes of analysis, the District Court reviewed the plain language of the regulations, finding the " plain language of [section] 402.03 does not eliminate consultation in situations where there is some meaningful discretionary involvement or control in the action." Summary Judgment Opinion at 16, 16 n.6 (Fed Appellants' Att. B). The Court notes that the agencies have the "considerable discretion in their administration of the systems" and that "the congressionally-authorized operating purposes of all 14 Columbia Basin DAMS and water projects include hydroelectric power production, fish and wildlife protection, and recreation,"Summary Judgment Opinion at 21 (Fed Appellants' Att. B). The Court reviewed the case law and found that it " does not support NOAA's new approach" (Summary Judgment Opinion at 17 (Fed Appellants' Att. B)), concluding that NOAA's interpretation "would create a second exemption far broader than the only one thus far created by Congress" (Summary Judgment Opinion at 22 (Fed Appellants' Att. B)). "[T]he ESA requires the biological opinion to analyze the effect of the **entire** agency action. *Conner v. Burford*, 8484 F.2d 1441, 1454 (9th Cir. 1988) (emphasis in original)." Summary Judgment Opinion at 23 (Fed Appellants' Att. B).

The District Court conducted similarly careful analyses of the statute, the regulations, and the case law in reaching each of its other three conclusions. The Court relied on the plain language of ESA regulations together with consultation guidance in the Consultation Handbook to conclude that NOAA must analyze the aggregate effects, not just "net effects", in reaching its jeopardy determination. Moreover, the Court noted that the "net effects" analysis failed to adequately consider the status of the species and contrasted sharply with prior BiOps that started out by reviewing species population trends. Summary Judgment Opinion at 28,n.12 (Fed Appellants' Att. B). The Court carefully reviewed NOAA's critical habitat analysis before determining that it had arbitarily reached the conclusion that the action would not adversely modify critical habiat necessary for recovery, as well as for survival by failing to adequately analyze short term effects, relying on uncertain long-term improvements as offsets, and concluding that critical habitat was sufficient for recovery even though it did not have sufficient biological information to inform that decision. Summary Judgment Opinion at 33 (Fed Appellants' Att. B). Similarly, the Court carefully reviewed the ESA, its regulations, and recent case law (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1069 (9th Cir. 2004)) to conclude that NOAA's omission of a recovery standard from the jeopardy analysis to be

unlawful. Summary Judgment Opinion at 34 (Fed Appellants' Att. B).

The District Court found that NOAA's newly formed interpretations of the ESA and regualtions were entitled to "only limited deference" due to the significant departure of the 2004 BiOp from the long-standing practices evidenced in the 1995 and 2000 BiOps and from previous regulatory interpetations. Summary Judgment Opinion at 24 (segregation of action), 29 (aggregation of baseline effects), 35(omission of recovery)(Fed Appellants' Att. B). "When an agency's new interpretation of a regulation conflicts with its earlier interpretations, the agency is 'entitled to considerably less deference' than a consistently-held agency view. *Immigration and Naturalization Services v. Cardoza-Fonseca*, 480 U.S. [421,] 446 n.30 [(1987)]." Summary Judgment Opinion at 24 (Fed Appellants' Att. B). With regard to the segragation issue, the Court noted, "NOAA has not demonstrated a reasonable rationale" for its signficant departure from previous interpretations and its interpretation was thus entitled to "only limited deference." *Id.*. Regarding the aggregation and omission of recovery issues, the District Court explicitly found that NOAA was not entitled to deference because NOAA's interpretations of its regulations conflict with its earlier interpretations. Summary Judgment Opinion at 29, 35 (Fed Appellants' Att. B).

The District Court's opinion is solidly based on the ESA, its implementing

regulations, the case law, and the status of the runs. In order to prevail on appeal, the Appellants will have have to show that the district court erred in each of its four conclusion. Consequently, there is little likelihood that Appellants will prevail on appeal.

3. The District Court properly considered the "public interest" before enjoining the Corps to provide spill for ESA-listed Snake River fall Chinook. The "public interest" weighs strongly in favor of denying the requested stay.

The District Court is clearly very concerned about fashioning an equitable remedy that will protect the salmon and assure compliance with the ESA. Injunction Order at 9-11(Fed Appellant's Att. A) (urging parties to reach consensus on spill operations). The Court has the discretion to fashion relief to assure the survivability of the affected salmon and as equity demands. *See NWF v. NMFS*, 01-640-RE, Opinion and Order (D. Or. July 1, 2003) (Docket # 439) (remanding, but not vacating, the 2000 FCRPS BiOp). More broadly, the district court heard and acknowledged the lengthy argument that the federal government agencies, States, tribes, Plaintiffs and others should fashion a solution to for the impacts of the FCRPS dams and their compliance with the ESA:

> I agree with counsel from Washington 100 percent that this is not an insoluble problem. It can be resolved. I thought it when I remanded the 2000. And I still think it. But I think I've got to have a lot more help from the agencies, from the plaintiffs and from everyone else. To stop this idea of my way or else and get down to what really will work,

and it can be done, and you are the people that are going to have to do it. Transcript p. 119 (Appellee NWF Exh. 10). The District Court has fashioned a remedy designed to commit the parties to the proceeding to developing solutions. In 2003, the court's remand to NOAA was "pretty general." Transcript at 118. That remand didn't work. Although the court hoped the parties would fashion a solution, "they never got there." Transcript at 38 (Appellee NWF Exh. 10); *see* Summary Judgment Opinion at 5-7 (Fed Appellants' Att. B)(discussing failings of the remand proceedings on the 2000 FCRPS BiOp). Instead, NOAA and the action agencies attempted to redefine their obligations under the ESA to simply avoid the consequences of most of the salmon mortality imposed by the FCRPS dams.

The public interest favors compliance with the Endangered Species Act. Cite. The court has fashioned a remedy to known to reduce the harm to salmon and designed to bring the parties to a solution. The court had extensive information before it concerning the economic and other consequences of the Plaintiffs' requested relief. *See* Niemi Dec. and Sheets Dec. (Appellee NWF Exh. 3 and 4)(discussing economic considerations related to the proposed injunctive relief and responding to federal defendants' declarations). As the Plaintiffs' demonstrated, the Pacific Northwest enjoys some of the nation's lowest cost

electricity supply. Niemi Dec. ¶ 9 (Appellee NWF Exh. 3). Even after a 50% increase in its power rates following the 2001 West Coast energy crisis, BPA's wholesale power rates is approximately 40% below market. [4] After implementing the spill required by the district court, BPA's wholesale power rates still will be approximately more than 36% below market. Sheets Dec. ¶ 12 (Appellee NWF Exh. 4).

The court was concerned with the economic information regarding the consequences of spill, the Bonneville Power Administration's wholesale power rates, and regional politics. Transcript at 5 (Appellee NWF Exh. 10). But, as the court found, these considerations are secondary to the welfare of the species whose existence is imperiled. 2005 Injunction Order at 9 (Fed Appellants' Att. A) *citing National Wildlife Fed. v. NMFS*, 235 F.Supp.2d 1143, 1161(W.D. Wa. 2002); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987). Protecting

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[4] In 2001, BPA faced the unprecedented circumstance of very low streamflows limiting its generation supply and extraordinarily high market prices for purchased power. *Confederated Tribes of the Umatilla Indian Reservation v. BPA*. 342 F.3d 943 (9th Cir. 2002). BPA responded among other ways by curtailing spill for salmon, but developing measures "to offset any impacts of the emergency operations." *Id.* at 932-33. Contrary to BPA's record of decision upon which the Ninth Circuit relied in *Umatilla*, the fish mitigation measures BPA promised did not materialize. BPA chose not to proceed with the mitigation projects recommended by the region. Instead, BPA cut its fish and wildlife budgets in 2002 and 2003 by approximately $80 million. CRITFC Comments on 2004 BiOp, at A 27-29 (Appellee NWF Exh. 5).

species listed under the Endangered Species Act is in the public interest, including the interests of the Treaty Tribes. *See United States v. Winans* 198 U.S. 371, 380-81 (1905)(the right to take fish is "not much less important to the existence of the Indians than the atmosphere they breathed").

CONCLUSION

Since the injunction issued, the Corps of Engineers has reached a "general agreement" with the Treaty Tribes, Plaintiffs, and others on an implementation plan for the court ordered 2004 summer spill. Lorz Dec. Exh. 1. The implementation plan effectively addresses the dissolved gas and study related concerns identified in the defendant and defendant-intervenor's petitions for stay pending appeal. Lorz Dec. ¶¶15-17. The court's order is implementable and in the public interest. The district court's order transgresses none of the standards by which its actions are judged on appeal. Instead, the District Court properly exercised its equitable discretion. The Treaty Tribes respectfully request this Court to deny the extraordinary motions for a stay.

DATED this 17th day of June, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 05-

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Dave Cummings

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6/17/05

Date

CERTIFICATE OF SERVICE

Copies of the foregoing Treaty Tribes' Joint Motion for Leave to File a Joint *Amicus Curiae* Brief and Treaty Tribes' Joint *Amicus Curiae* Brief In Opposition to Federal Defendants-Appellants' Emergency Motion for a Stay Pending Appeal were served on the following counsel of record on June 17, 2005, by electronic mail and by Federal Express or hand delivery for delivery on Monday June 20, 2005:

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